

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 521 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

=====

1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

VAGHABHAI MANIBHAI BARAIYA

Versus

STATE OF GUJARAT

Appearance:

MR NS DESAI for Petitioner

MR ND GOHIL, LD.APP for Respondent No. 1

CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 30/03/98

ORAL JUDGEMENT

1. Prosecutrix Jaliben Abhabhai, daughter of Somabhai, aged around 37 years, mother of three children had an occasion to go to village Koydam for handing over the coupons of mid-day meals received by her children Dahyabhai, Ramabhai and Laxmanbhai. On her way at a distance of about a couple of kilo meters the accused Vagha Mania, aged around 19 years had stopped her asking

her where she was going alone and prosecutrix replied that she was going for taking wheat in exchange of mid-day meals' coupons. Thereupon the accused offered for having sexual intercourse with the complainant, who replied that she was not keeping well and that she had not taken her meals for nearly two days and he should let her go. The accused was not amenable and he caught hold of the prosecutrix's hairs and dragged her on to the hill, saw to her legs being bent, lifted her clothes, took out his pant (pantaloon) and had committed sexual intercourse against her will. He then threatened the prosecutrix that she would be killed if she informed any-body about the incident. Thereafter, the prosecutrix walked down the distance to her home. Since she came to know that her husband had gone to the field she went there and talked about the incident to her husband, who informed Fulabhai, who was the head of the village. Since it was evening time and since there was no vehicle available for going to Virpur (Virpur Police Station), the complaint was given on the next day. The offence was registered and investigated. Ultimately, after the investigation was over, the case was committed to the Sessions Court, Kheda at Nadiad, where the Ld. Addl. Sessions Judge, after conclusion of evidence, recording of further statement of the accused and hearing the learned advocate for the accused and Ld. A.P.P. for the State, rendered the impugned judgment and order dated 18/2/1995 of conviction and sentence against the accused in Sessions Case No. 32 of 1992.

2. The accused was convicted of the offences punishable u/Ss. 376 and 506 (2) of the Indian Penal Code (for short 'IPC') and sentenced to undergo rigorous imprisonment (for short 'RI') for 7 years and to pay fine of Rs.2,000/- in default to undergo RI for 2 months and to undergo RI for a period of one month and to pay fine of Rs.100/- and in default to undergo RI for 7 days, respectively. It is this judgment and order of conviction and sentence which has been subjected to challenge in this appeal. It has been the case of the accused that he has been falsely implicated on account of Fulabhai's enmity with him, Fulabhai being a relative of prosecutrix, and in any event the medical evidence does not support the prosecutrix. According to his stand, the FIR was lodged very late and the explanation given by the prosecutrix could never have been accepted. Even the want of willingness or consent on the part of the prosecutrix is not ruled out beyond reasonable doubt by the prosecution.

3. I have heard the learned advocate for the

appellant and the Ld. A.P.P. for the State. The submissions which have been made on behalf of the appellant - accused assume importance bearing in mind the fact that the age of the accused was around 19 years and the age of the prosecutrix was around 37 years at the time of the incident. This fact could not be counter-acted by the Ld. A.P.P. after going through the whole of the evidence produced on the record of the Ld. Addl. Sessions Judge. Other facts which are not in dispute are that the prosecutrix was married having three children at the relevant point of time and that she and the appellant were working together on the scarcity work. It is also not in dispute that there were exchanges of words on some occasions between the accused and Fulabhai in the matter of supply of water at the place of scarcity work. In the background of such facts, the evidence which has been placed on record would merit consideration.

4. The prosecutrix came to be examined at exh. 7 as P.W. 1. She has spoken to the facts of the prosecution case as noticed hereinabove in her examination-in-chief. However, it has not clearly appeared as to how much distance she was dragged by the accused. She has, however, testified that as a result of such dragging her knee sustained injury of abrasion. It is not her case that she tried to escape or shouted for help. She has admitted in her cross-examination that there was enmity between accused and Fulabhai for a period of 2 to 3 years before the date of alleged incident. According to her, the incident occurred at about 11 to 12 O'clock in the morning on 15/8/1991; whereas in her cross-examination she has stated that she went back home at about 1.00 O'clock during noon period and again went to inform her husband, who was in the field and both of them had gone to the house of Fulabhai at about 4.00 O'clock in the afternoon. In her further cross-examination she has admitted that within about an hour from the time when she met her husband both of them returned home and this was at about 2.00 O'clock in the afternoon. She has also admitted that they must have taken about half an hour to reach Fulabhai's house and it must be around 3.00 O'clock in the after-noon that they left Fulabhai's house after discussions. She has then admitted that if they wanted to go from Chikhali (village Chikhali), where she was residing, to Virpur, she would have to go to village Koydam for picking up a vehicle or bus. She has admitted that many vehicles would be available at village Koydam. She has also admitted that luxury buses of Mohanbhai would also be available for village Virpur. She has admitted that tempo vehicles of Natvarbhai would also be

available at village Koydam. She has finally admitted that S.T. Bus would also be available at about 5.00 O'clock in the evening for going to Virpur from Koydam. Now if this cross-examination of prosecutrix is borne in mind, there appears to be a great deal of substance in the submission made by Mr. Desai before this Court that there is no plausible or acceptable explanation for lodging FIR so late as in the morning of the next day, namely, 16/8/1991. She has then referred to about she having been down with fever since last about 3 to 4 days and about she being in menstruation on the day of the incident. She has, however, stated that she did not know whether the shop from where wheat would be available in exchange of mid-day meals coupons would be closed as it was the day of 15th August (day of independence). She has stated in her cross-examination that she was proceeding from village Chikhali to village Koydam, whereas the accused was coming from village Nan Salai to village Chikhali Joja and the accused was coming from the opposite direction from the side the prosecutrix was proceeding. This would also belie the version of the prosecutrix that she was followed by the accused at the time of the incident. She admitted that she did not have any injury on any other part of the body except that she had ordinary abrasion. She has also admitted that there were fields surrounding the place of incident, but according to her version they were a little away from the actual scene of offence. According to her they were at a distance of 500 to 700 ft. from the place of incident. She has then admitted that she did not state in her complaint that she was down with fever on the day of incident and that she did not state in her complaint about being allowed to go or being left alone by the accused. She has admitted that she was able to walk down the distance from the place of incident to the field where her husband was available and that she did not feel any difficulty. She admitted that she reached the police station at Virpur between 11.30 and 12.00 O'clock on the next day i.e. 16/8/1991. In her re-examination by the Ld. A.P.P. she replied that she started menstruation period before about 2 to 4 days of the day of incident. She stated that she was not bleeding on the day of incident. Again in the cross-examination by the learned advocate for the accused she admitted that she in fact was bleeding on the day of incident and there were blood stains on account of menstruation on that day.

5. With the aforesaid evidence of the prosecutrix the medical evidence might be noticed.

Dr. Dipakchandra Shankarlal Leuva, P.W. 4 exh.
10 had an occasion to examine the prosecutrix Jaliben

Abhabhai at about 2.45 O'clock in the afternoon on 16/8/1991. She had disclosed the history of rape to the doctor. The doctor had an occasion to examine her and he found that there were no marks of injuries on any part of body including the private parts. There were no injuries on the face, on the neck, on the chest or any other portion except one abrasion 1 cm. x 0.5 cm. on the front portion of right knee. He had sent the relevant samples for examination by the Chemical Analyser. He opined that the injury of abrasion on the knee of the prosecutrix could be caused by some friction. He accordingly proved his medical certificate which was placed at exh. 12. In his cross-examination the witness has admitted that there were no signs or marks which would ordinarily be present on the body of the woman who had an occasion to resist the rape. He has also admitted that the prosecutrix was used to sexual intercourse. He admitted that the injury of abrasion could be caused on account of a fall or on account of some uneven surface coming in contact with the knee. There was no injury either on upper side or inner side of private part of the prosecutrix. The hymen was absent. From the aforesaid evidence of the medical witness it might be visualised that there is almost no corroboration to the story which the prosecutrix has said. On the contrary, the medical evidence runs counter to the allegations of rape which the prosecutrix made.

6. From the discussion of the aforesaid evidence it would appear that there are two vital circumstances which would go against the prosecution. The first circumstance is that the complaint was belatedly filed and the explanation rendered by the prosecution is not acceptable in as much as there was enough time for the prosecutrix, her husband and Fulabhai to proceed to Virpur Police Station as appropriate and/or sufficient facility of transport was available to them. Second important circumstance is as appearing in the medical evidence which runs counter to the prosecution story. Both these important factors coupled with the fact that the accused happened to be 19 years of age and the prosecutrix happened to be 37 years of age with three children, a reasonable doubt arises with regard to whether in fact the accused committed sexual intercourse with the prosecutrix and if yes, whether it was contrary to the will and consent of the prosecutrix. In my opinion benefit of such reasonable doubt must go to the accused.

7. Other pieces of evidence do not throw any light on the prosecution case. It will be important to note that Fulabhai and husband of the prosecutrix though cited

as witnesses, have not been examined by the prosecution. That is an added circumstance for the accused to get benefit of doubt in the present case.

8. Mr. Desai, learned advocate appearing for the appellant placed reliance upon a decision of this Court contained in the case of State of Gujarat v/s. Bharwad Govind Merambhai reported in 1993 (30) G.L.T. 15 rendered by a Division Bench consisting of K.G. Shah and D.G. Karia, JJ. (as they then were) in Criminal Appeal No. 691 of 1991 with Criminal Appeal No. 40 of 1992. What is important to be noticed from the decision which has been referred to by Mr. Desai for the accused is that reference in that case appears to have been made to medical evidence indicating that there were no external marks of injuries and that the medical evidence did not lend any support to the testimony of the prosecutrix there. Hence, in the circumstances of the case before the Division Bench conviction of the accused was held not sustainable. In the present case there are added circumstances as noted above. Hence, in the facts of the case, following order is passed :-

In the result, this appeal is allowed. The impugned judgment and order of conviction and sentence are hereby set aside. The appellant-accused - Vaghabhai Manibhai Baraiya is hereby acquitted of the offences punishable u/Ss. 376 and 506 (2) of the IPC with which he was charged. Fine, if paid, shall be refunded. He shall be released forthwith if not required for any other case.

Office to send the writ immediately without any delay to the concerned jail (Central Prison, Vadodara).

* * * * *

PVR cr.a52195j.